IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-744

THE CARVEL COMPANY,
Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the United States

Leonard Kopelman,
Counsel for Petitioner
10 Post Office Square
Boston, MA 02109
(617)482-4515

INDEX

TABLE OF CASES

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977
NO.

THE CARVEL COMPANY, Petitioner
vs.
THE NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Carvel Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals entered in the above-entitled case on September 1, 1977.

OPINIONS BELOW

The opinion of the Administrative Law Judge, which is unreported, is printed in the Appendix hereto, infra, page 2.

The opinion of the National Labor Relations Board was reported at 226 N.L.R.B. No. 18, 93 L.R.R.M. 1157 (1976), and is printed in the Appendix hereto, infra, page 19.

The opinion of the First Circuit Court of Appeals is, as yet, unreported (see The Carvel Company v. The National Labor Relations Board, Civil No. 76-1490) (1st Cir., filed September 1, 1977) and is printed in the Appendix hereto, infra, page 32.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1254.

QUESTIONS PRESENTED

Was the withdrawal of the employer, The Carvel Company, from a multi-employer bargaining unit timely so that the employer was not bound by a subsequent collective bargaining agreement?

STATEMENT OF THE CASE

The case was initially heard by Administrative Law Judge Melvin J. Wells. The basis for federal jurisdiction before Judge Wells was Title 29 United States Code, Section 160.

On April 21, 1976, Administrative Law Judge Melvin J. Wells issued a decision (app. 2) in this proceeding in which he found that the petitioner, The Carvel Company, had timely withdrawn from a multi-employer bargaining association and was not obligated to sign that contract ultimately negotiated between the association and the union. General Counsel appealed this decision to the National Labor Relations Board.

On September 23, 1976, the National Labor Relations Board rendered a decision and order (app. 19) whereby it found that The Carvel Company's withdrawal from the association was not timely and that The Carvel Company must comply with its order.

On September 1, 1977, the First Circuit Court of Appeals upheld the decision and order of the National Labor Relations Board (app. 32).

The petitioner had for many years been a member of the Pipefitting Contractors Association, Inc. of Maine (Association), a multi-employer bargaining unit. As such

the petitioner has been a party to a series of contracts with the Plumbers, Steamfitters and Metal Trades Local 321, AFL-CIO (Union). As The Carvel Company decided that it wanted to permanently and sincerely embark on its own bargaining with the Union, it withdrew from the Association.

The 1973 two-year contract between the Association and the Union provided that it was to continue in effect until April 20, 1975. However, "If either party desires a change in this agreement after April 30, 1975, they shall notify the other party on or before February 1, 1975, and both parties shall meet within 15 days to discuss same." Absent such notice the contract automatically renewed itself for another year.

On February 11, 1975 the Union sent the Association a letter (set out in full in the Administrative Law Judge's Decision, app. 4 and 5) stating that the membership had voted to reopen negotiations and included a list of the Union's "tentative proposals."

On February 14, 1975 the Association replied and acknowledged receipt of the Union's letter (set out in full in the Administrative Law Judge's Decision, app. 5 and 6) and stated that this exchange of letters served as the initial negotiation which the contract requires to take place prior to February 15, 1975. Also the letter stated that the Union would be contacted "in order to set a firm date for the next meeting for bargaining purposes." No prior meeting ever took place.

On February 27, 1975 the president of The Carvel Company wrote to the Association and unequivocally resigned by stating in his first full paragraph, "with much regret I am submitting my resignation from the Pipefitting Contractors Association." On March 5, 1975 the president of the Association accepted The Carvel Company's resignation and informed The Carvel Company that it would not be represented by the Association.

On March 10, 1975 the Association following its long-standing practice sent to the Union its list of the current membership. The petitioner was not on this list. The Business Agent of the Union acknowledged receiving this list and noticed the omission of The Carvel Company and called the president of The Carvel Company, Mr. Richard Carvel, who then informed the Business Agent of the withdrawal personally.

The first meeting and the first negotiations between the Association and the Union actually took place on April 9, 1975, approximately one month after The Carvel Company gave written notice of its withdrawal and the Union received it. In fact, the Business Agent of the Union, the General Counsel's first witness, stated in his answers at the trial before the Administrative Law Judge:

Q. Is it my understanding that the first negotiating meeting between the parties was held on April 9, 1975 at the Holiday Inn in Lewiston?

A. Yes.

Q. Is it true that the reasons why negotiations took place at that date and not earlier was that there was little plumbing work at the time; you wished to have more pressure to bear and wait until there was a lot more plumbing work?

A. True.

Q. Is it correct in the first 10 days of March you received a list that was dated March 5, of all the Association members?

A. Yes.

Q. Isn't it a fact that The Carvel Company was not on that list?

A. Yes.

Q. Isn't it true also that at the first meeting of April 9, 1975 you were informed by the Association's bargaining committee that The Carvel Company had withdrawn from its membership in the Association?

A. Yes.

In fact, nothing was accomplished at even the first meeting on April 9, 1975 as the Union wanted a one-year contract and the Association wanted another two-year contract. This key item was not even requested in the Union's first letter.

Another member of the negotiating team for the Union admits that the first negotiating session took place around April 9, 1975 at Lewiston, Maine. No one stated otherwise.

On April 30, 1975 the contract with the Association expired and no new agreement was ratified. Whereupon

the Union went on strike about May 5, 1975 until May 31, 1975 when a new agreement was ratified. During the period April-May 1975, the Business Agent of the Union on many occasions negotiated with The Carvel Company as a "non-member" as can be seen from his answers to questions.

A. It's my firm recollection that every time I talked with Mr. Carvel I asked him to sign the contract.

Q. At some point around the strike didn't you try to negotiate with Mr. Carvel and ask him to sign a letter of intent?

A. Yes, I did.

Q. Did you ask him if you could get together with him and try to continue to negotiate the situation?

A. I don't believe I asked him during the strike.

Q. Somewhere in that intermediate period of time, either before or after?

A. I think it was after.

Q. As a result of seeing the ad did you call Mr. Carvel again in order to negotiate some sort of deal?

A. I attempted to call him Tuesday I believe. I couldn't reach him, I think it was Friday I reached him by phone.

Q. And you tried to negotiate and discuss this with him?

A. I did.

REASONS FOR GRANTING THIS WRIT

The question of when an employer should be permitted to withdraw from a multi-employer bargaining

unit is of crucial importance to labor relations in the United States.

The initial decision of an employer to join a multi-employer bargaining unit is a voluntary one. The decision is based in part on the employer's ability to withdraw from the unit when he feels that it no longer serves the desired purpose.

Balanced against this ability to withdraw from the unit is the need for stability in the bargaining process. The employer should have sufficient freedom to withdraw from the unit so that it will not be discouraged from joining such units, while at the same time, limits must be imposed upon withdrawing at any time in order to foster stability in the bargaining process.

The N.L.R.B. first clearly enunciated their rule for withdrawal from a bargaining unit in dictum in the case of Retail Associates, Inc. 120 NLRB 388, 41 LRRM 1502 (1958). It was clear in this case that negotiations had continued for a significant length of time and a withdrawal by the employer would cause a substantial disruption in the bargaining process. The Board thus formulated the rule in their dictum that an employer could freely withdraw at any time before the start of actual negotiations.

However, the Board has never defined what it meant by actual negotiations. A review of the cases by the Board found that the determination of the timeliness of withdrawal lacked any consistency and was applied on an ad hoc basis, Cooks, Waiters and Waitresses Union,

Local 327, 131 NLRB 198 (1961). It is the contention of the petitioner that the Board erred in finding that it failed to withdraw before the start of negotiations. Further, even if one could construe the facts to hold that negotiations had begun, this would constitute a per se application of the Retail Associates rule and be to the detriment of labor relations in the United States.

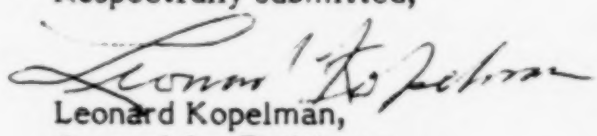
Petitioner feels it is essential for this Court to grant a writ of certiorari in this case in order to finally determine the standards for employer withdrawal from multi-employer bargaining units. Numerous cases have been argued in the various courts in connection with the issue of timely withdrawal. It is believed that if this Court were to hear this case it would enunciate a standard that would be clear and thereby foster labor relations and prevent the massive litigation that has occurred around this issue.

The petitioner believes that the per se rule established by the National Labor Relations Board will discourage employers from participating in multi-employer bargaining units and will injure labor relations in the United States. Such a result and without a public hearing indicates that the Board abused its discretion as an administrative body. It is, therefore, the petitioner's request that this Court establish a definitive rule in this area with proper consideration given to its affect on American labor relations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Leonard Kopelman,
Counsel for Petitioner
10 Post Office Square
Boston, MA 02109
(617)482-4515

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

THE CARVEL COMPANY,
Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent

APPENDIX

Leonard Kopelman,
Counsel for Petitioner
10 Post Office Square
Boston, MA 02109
(617)482-4515

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: The Carvel Company

6.25.75	Charge filed
8. 8.75	Amended Charge filed
9. 5.75	Complaint and Notice of Hearing, dated
9.25.75	Answer of C and D Plumbing and Heating Company, received
9.25.75	Petitioner's Answer, received
11.18.75	Order Rescheduling Hearing, dated
11.25.75	Order Rescheduling Place of Hearing, dated
12.10.75	Hearing opened
12.12.75	Hearing closed
4.21.76	Administrative Law Judge's Decision issued
5.27.76	General Counsel's Exceptions to Decision of the Administrative Law Judge, received
5.28.76	Petitioner's Exception, received
9.23.76	Decision and Order issued by the National Labor Relations Board

JD-249-76
Portland, ME

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

THE CARVEL COMPANY AND
C AND D PLUMBING AND HEATING
COMPANY

and Case No. 1-CA-10,813

PLUMBERS, STEAMFITTERS AND
METAL TRADES, LOCAL 321, AFL-CIO

S. Anthony DiCiero, Esq., for
the General Counsel.
Leonard Kopelman, Esq., Boston,
MA, for the Respondent.
James L. McLaughlin, Brewer,
ME, for the Charging Party.

DECISION

Statement of the Case

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Bangor, Maine, on December 10, 11 and 12, 1975, pursuant to charges filed June 25, 1975, and amended August 8, 1975, and a complaint issued September 5, 1975, alleging violations of Section 8(a)(1), (3) and (5) of the Act. The General Counsel and the Respondent have filed briefs.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Employer and the Labor Organization Involved

Carvel Corporation is a Maine corporation, with its principal office and place of business at Portland, Maine, and does business as a plumbing contractor. In the course of its business operations, it receives goods and materials valued in excess of $50,000 directly from points outside the State of Maine. I find, as Carvel admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. C & D Plumbing and Heating Company, herein called C & D, also a Maine corporation engaged in the plumbing contractor business, and also having its principal office in Portland, Maine, is alleged to be engaged in a common business enterprise with Carvel, and to be a "continuation and/or alter ego of Carvel." For reasons that will become apparent subsequently, I make no finding in this respect, but assume, for purposes of resolving the issues in this case, that C & D, which is admittedly wholly owned by Richard Carvel, who owns the Carvel Company, is under Carvel's control. Plumbers, Steamfitters and Metal Trades, Local 321, AFL-CIO, herein called Local 321, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

Respondent Carvel has been a member of the Pipefitting Contractors Association, Inc., of Maine,

herein called the Association, for many years, and as such a member of a multiemployer bargaining unit and party to a series of contracts with Local 321. The 1973 contract between the Association and Local 321 provided that it was to continue in effect until April 30, 1975, but that "if either party desires a change in this agreement After April 30, 1975, they shall notify the other party on or before Feb. 1, 1975, and both parties shall meet within fifteen days to discuss same." The contract goes on to state that absent such notice, the contract automatically renews itself for another year.

On February 11, Union President James McLaughlin wrote to the Association as follows: 1/

> At a Notified Meeting of U.A. Local #321, Bangor, Me. it was voted by majority to re-open contract negotiations with your organization. The following tentative proposals were presented for negotiation, with no changes proposed in the body of the contract.
>
> Wages - $1.65 per hour increase
> Vacation - 5% of negotiated wage
> Travel - 22¢ per mile & by employee vehicle 25¢ per mile
> Per Diem - $15.00 per day
> Apprentice Fund - to 5¢ per hour

1/ Although the letter was addressed to one Omer Ouelette, as President of the Association, Ouelette was no longer President, Earl D. Reed had succeeded him. However, Reed responded to the Union's letter, so the "error" was of no consequence. Ouelette was, on February 11, chairman of the Association's bargaining committee.

In a conversation with Earle Reed, we agreed that in lieu of a called meeting at this time, it would suffice primarily to set forth in a letter, the desired changes in the contract. We have, by the way, composed a contract for Supplemental Housing, Refrigeration etc. for your consideration and study. We think it will be an asset to our organization to institute such a contract in this particular area.

We are ready at any time to sit down with you and discuss the issues as presented. The members of our negotiating team are as follows:

David Savage, Local President
Michael Crawford, Appr. Comm.
Everett Pellon, member
Merle Boyer, Local Vice President
Timothy Jacques, member) alternate
Lawrence Hogan, Fin. Sec.)
James McLaughlin, Bus. Agent

Respectfully yours,

James McLaughlin, B. A.
U. A. Local #321

The Association, on February 14, wrote back as follows:

> This acknowledges receipt of your letter dated February 11, 1975, which listed your tentative proposals for changes in the present contract, and which enclosed a copy of your proposed Supplemental Agreement for Residential Housing and similar work.
>
> This also confirms our understanding that this exchange of letters serves as the initial negotiation which the contract requires to take place prior to February 15th.

Your tentative proposals will be presented to our Committee, and we will contact you in order to set a firm date for the next meeting for bargaining purposes.

The Chairman of our Bargaining Committee is Roger Ouellette, and the member in your area is Ken Nelson of Paul A. Lawrence. In order to make it easier for you, any communication with Ken will serve as a communication with the Association and vice versa.

Very truly yours,

Earle D. Reed
President

On February 27, Richard Carvel wrote to Reed, submitting the resignation of Carvel Company from the Association, which letter was acknowledged, and the resignation accepted, on March 5, by President Earle Reed. On March 10, Reed wrote to Local 321, forwarding a list of the current members of the Association. Carvel was not on this list, nor was C & D or any other company affiliated with Carvel in any way. McLaughlin acknowledged having received this letter, and noticing the omission of Carvel from the list of members. He then, a day or two later, called Richard Carvel, asked him why his company was not on the list, and was told that the Company was no longer affiliated with the Association, but that he would "pay the wages, fringes, and so forth, but he wouldn't sign a contract with the union."

The first actual meeting between the Association and Local 321 for the purpose of negotiating a new agreement took place April 9. McLaughlin testified that the first session took place that late because there was little plumbing work earlier, and he wanted to be able to bring more pressure to bear at a time when plumbing work was up. After the contract expired, and with no new contract then having been agreed upon, Local 321 went on strike, the strike beginning about May 5. The five employees working for Carvel at an Addison, Maine elementary school job where the general contractor was Nickerson & O'Day went out on strike, along with all other Local 321 members in the entire area. These five employees were Edward Pellon, David Savage, George Armstrong, Richard Faulkner, and Everett Pellon. The strike lasted until about May 31, when the membership ratified a new contract.

Work continued on the Addison school project, as no other craft went on strike. After May 5, Richard Carvel made a number of inquiries of McLaughlin, and also spoke to employees Ed Pellon and Everett Pellon, concerning when the strike might be over. He was told a number of times that ratification of the contract was "expected" soon. About the middle of May, Richard Carvel specifically told Robert Chase, treasurer of Nickerson & O'Day, that the strike was expected to end in a matter of a few days, and the men would go back to work at once.

According to Carvel, about the third week of the strike, when Chase told Carvel he could not want any longer, Carvel asked Chase to "hold out for another week." Chase's testimony does not precisely confirm Carvel's. Chase did testify that Carvel, at that time, told him "that the strike would be expected to end in a matter of a few days at the most and that the men would be back to work immediately," but when asked "Was your company asked to keep Carvel Company on?" he replied "I really don't think we were asked to, specifically, but we had no intentions of doing otherwise until maybe about the 20th, when it became obvious that things still hadn't ended and it was still going on, and we were getting more and more in a bind for some work down there, that we finally decided that we've got to try to do something else." It is clear that the import of Carvel telling Chase that the strike would be over soon and the men would be back immediately was that Carvel wanted to keep the work for Carvel Company. As Chase put it in his testimony, he was "not taking that (the prediction that the strike would end soon) for an answer any more. It just wasn't a good enough answer for us."

It was about May 20 or so that Chase began "aggressively" to seek a replacement for Carvel, because of penalty clauses in its contract, and because of its "reputation," which would be affected if the project were not finished on time. Chase spoke with Richard Carvel, and with Carvel's general superintendent, Walter

Butchart, asking if they knew anyone Nickerson & O'Day could get to do the job, and also talked with several other plumbing contractors in the area. The others (Maynard Lane and Robert Morin) both told Chase they already had too much work to do. Richard Carvel suggested that C & D could do the work, telling Chase that Dow (President of C & D) had been a superintendent for Carvel at one time, and that he knew Dow to be a reliable person, but not telling Chase that he (Richard Carvel) owned C & D.

About May 27, Everett Pellon, one of Carvel's employees, who was also on Local 321's negotiating committee, told Carvel that he thought the contract would be ratified the following Saturday. Also on Tuesday, May 27, Carvel called employee Ed Pellon, and asked Pellon to use his influence to get the members of Local 321 to ratify the contract at a union meeting the next night, telling Pellon "we have to get back on that job."

In fact the contract was ratified at a Local 321 meeting on Saturday, May 31. Ed Pellon told Richard Carvel on Sunday, June 1, of the ratification, but Carvel said that the job had been "taken away from us," that a "nonunion job contractor will be on the job site in the morning." Carvel also told Pellon to "secure the job." In the meantime, about May 27, Byron Dow had received a call from Chase asking him whether he would be interested in taking over and completing the Addison job.

Dow went to Chase's office, and after looking over the blueprints, told Chase that C & D would go up and do the job. At Dow's request, Chase, on May 28, sent a letter to C & D, referring to the Addison job, and stating:

> Because of the inability of the Carvel Company to man this job, Nickerson & O'Day is taking over the Plumbing and Piping labor on this project and reassigning this labor to C & D Plumbing and Heating Company as of this date.
>
> C & D Plumbing & Heating will requisition monthly the value of work performed during the past month such requisitions to be submitted directly to us. We, in turn, will backcharge these items against Carvel Company on a net basis.
>
> If there are any questions, please call the writer at any time.

Monday morning, June 2, Carvel's employees came to the job, having been directed to do so by the Union's business agent. Ed Pellon spoke with Chase about 10:45 a.m. or so to inquire about "what was going on." According to Pellon, Chase said that he wished Pellon had told him on Friday. (Obviously, he could not have told him definitely, as the contract was not ratified until Saturday.) Shortly afterward, one of Nickerson & O'Day's officials told the Carvel employees they were no longer on the job. The employees then left the job, and the next day C & D employees took over. According to Chase, he told Ed Pellon, when the latter said that the men were back at work, "I'm sorry. The middle of last week we

decided that something else was going to happen and you are going to have to pick up your tools and leave."

In addition to the above facts, there was considerable evidence introduced at the hearing concerning the relationship between Carvel Company and C & D Company, as well as evidence concerning a "Carco Company," and its connection with the other two companies. As noted above, Carvel does own both Carvel Company and C & D Company, and for purposes of deciding this case, I am assuming he completely controls both companies. The evidence concerning Carco is not, in my opinion, germane to the issues herein as they have developed.

The evidence also shows that Richard Carvel offered the men who had worked on the Addison job for Carvel Company work on other Carvel Company jobs. The two employees who testified, Everett and Ed Pellon, confirmed this. In fact, Everett Pellon did go to work at Brewer, Maine, for Carvel. He was subsequently, he testified, pulled off the job by the Union's business agent because the Union did not have a signed contract with Carvel. Ed Pellon was offered a "supervisory" job with Carvel.

B. Discussion

1. The alleged refusal to bargain

The General Counsel's theory of the refusal to bargain allegation, as stated at the hearing and in his brief, is to the effect that "negotiations" for a new

contract between the Association and Local 321 began on February 15, so that Carvel Company's withdrawal from the Association on February 27, was untimely under the Board's Retail Associates (120 NLRB 388) rule. Respondent claims that "negotiations" within the meaning of Retail Associates did not occur until the first meeting between the parties, which occurred April 9, so that Carvel's February 27 withdrawal from the Association, when coupled with the Union's admitted knowledge, by about March 10, of such withdrawal, was prior to bargaining negotiations and therefore effective and timely. In Retail Associates, the Board set forth the "rule" in the following dictum:

> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has comitted itself to the other, absent unusual circumstances.

The rule as stated suggests that the contract's provisions, as well as "actual bargaining negotiations," are significant to a determination of whether a withdrawal is timely. A careful review of subsequent cases involving the Retail Associates rule does not reveal any where a withdrawal was viewed as untimely when made prior to the start of actual bargaining negotiations,

although no case has been found defining those words. In the light of the General Counsel's theory here, and the lack of any definitive authority other than the Retail Associates dictum for viewing either the contract's automatic renewal date (February 1 here), or the date set by the contract for negotiations (February 15 here) as cutoff date for effective withdrawal, I am constrained to find no violation of Section 8(a)(5) in this case. The Union itself was late in seeking modification of the contract herein; despite the February 1 contract date, it did not write the Association until February 11. The Association's reply, on February 14, stated, as set forth above, that the "exchange of letters serves as the initial negotiation which the contract requires to take place prior to February 15th." In the circumstances, Carvel would have had every right to believe, with the passing of the February 1 date, that the old contract was automatically renewed. Had it been, and had Carvel then refused to sign it for its renewal year, there would have been a clear violation, not affected by the subsequent (to the contract's presumed renewal) withdrawal by Carvel from the Association. But here, the Union and the Association were each, in effect, waiving the contract's provisions with respect to the date for modifying the contract and negotiating a new contract.

In these circumstances, in my view, the only operative date against which to determine the timeliness

of a withdrawal from the Association must be the date on which actual negotiations began, and that date is April 9. I cannot view the statement in the Association's letter that the letters themselves constituted "negotiations" as really being negotiations within the meaning of the Board's rule. Accordingly, Carvel was not obliged to sign the contract ultimately negotiated between Local 321 and the Association, having effectively withdrawn from the Association and the multiemployer unit on February 27.

The General Counsel's brief states that "Even assuming that Carvel had the right and did in fact make a timely withdrawal from the Association, it is still obligated to bargain with the Union. The record is clear that even in this regard, Carvel has stated that it would only pay the wages and fringe benefits but would not agree to any other matters. On this point alone, a bargaining order is appropriate." It was not my understanding at the hearing that the General Counsel was litigating this theory, which is not the theory of the complaint. Nor is it clear on the record that there was any refusal by Carvel to negotiate individually with the Union. The statement by Carvel referred to in the General Counsel's brief was not in a context of "individual negotiations," but rather in terms of what Carvel would go along with in terms of the agreement reached between the Association (of which Carvel was no longer a member) and Local 321. Manifestly, the "issue"

suggested by the General Counsel in this respect was not in any sense "fully litigated." Accordingly, I make no findings in this regard.

2. The alleged 8(a)(3) violations

The General Counsel's theory of the alleged discriminatory discharge allegations respecting Carvel's five employees is that Richard Carvel "orchestrated" Nickerson & O'Day's "fears" that the Union's strike would not be over for a long time; that the penalty clause of Nickerson & O'Day's contract would be invoked against it, and that Carvel had nothing to lose by Nickerson & O'Day's "decision," as the contract went to C & D, wholly owned by Richard Carvel, so that the "only losers" would be the Union and the five union member-employees. The General Counsel contends that Carvel, during the week preceding Local 321's ratification of the contract and the consequent end of the strike, deliberately withheld from Nickerson & O'Day's representatives the knowledge he (Carvel) had that the contract would soon be ratified, "knowledge" he had obtained from Ed Pellon, Everett Pellon and James McLaughlin.

It is true that during the last few days, Richard Carvel might well have done more to persuade Chase, of Nickerson & O'Day, not to take the work away from Carvel Company. It is also true that perhaps Richard Carvel had no great incentive at this point to try to undo the assignment of the work to C & D, for he did own C & D. Neither of these facts, however, demonstrates that

Richard Carvel's motivation was at any stage invidious, that he took, or refrained from taking, any action for the purpose of ridding himself of "union" employees. Carvel had been receiving assurances all along that the strike would end "soon." He had attempted, successfully, to persuade Chase not to take steps to replace Carvel Company when Chase questioned him about the duration of the strike. He had even, as late as Tuesday, May 27, tried to get Everett Pellon to push through a union ratification of the contract on the very next day, although he already knew that Chase had made plans to replace Carvel Company, and that the replacement would likely be C & D. Earlier, of course, Richard Carvel had every reason to keep assuring Chase, as he did, that the strike would soon be over, for earlier, there was no way of knowing that Carvel's company, C & D, would get the job.

Indeed, Chase's testimony demonstrates that but for their being too busy, one or the other of two plumbing contractors Chase contacted when he became convinced that the ending of the strike was too unpredictable to continue without a plumbing contractor on the job, would have received the work formerly done by Carvel Company employees. Furthermore, Carvel offered all Carvel Company employees at Addison jobs at other Carvel locations, again demonstrating that there was no "animus" toward these union members. Perhaps, although this is entirely speculative, had Richard Carvel

transmitted to Nickerson & O'Day the latest "prediction" from the Pellons as to the imminent end of the strike, Chase might have kept Carvel Company on the job despite the commitment to C & D. But he also, and based on his testimony this seems more probable, might have regarded these "predictions" as no different from the earlier predictions, and that this was no longer "a good answer." Carvel may well by this time, as suggested by the General Counsel, have felt an indifference because he personally had "nothing to lose." 2/ This still would not make Nickerson & O'Day's action that of Carvel.

In sum, the record as a whole does not permit the finding that Carvel discriminatorily discharged its employees. The General Counsel has not demonstrated that Carvel was responsible for the men losing their jobs at the Addison project, nor has the General Counsel demonstrated (assuming arguendo) Carvel's "responsibility" by "inaction" any unlawful motivation on Carvel's part. For all the foregoing reasons, I conclude that the General Counsel has not established a violation of Section 8(a)(3) of the Act.

2/ The Company argues to the contrary in its brief; that Carvel did have "something to lose." I make no finding one way or the other, I am merely assuming the General Counsel's position in this respect to be the case in order to consider his argument in its best posture.

Conclusions of Law

Respondent has not engaged in any conduct violative of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 3/

ORDER

The complaint is dismissed in its entirely.

Dated at Washington, D. C.

Melvin J. Welles
Administrative Law Judge

3/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

D--1637
Portland, Maine

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE CARVEL COMPANY AND C AND D PLUMBING AND HEATING COMPANY

and Case 1-CA-10813

PLUMBERS, STEAMFITTERS AND METAL TRADES, LOCAL 321, AFL-CIO

DECISION AND ORDER

On April 21, 1976, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, Respondent filed an exception and a brief in support of the Administrative Law Judge's Decision and the single exception, and the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decisionin light of the exceptions and briefs and has decided to affirm the rulings, findings, conclusions, and recommendations of the Administrative Law Judge only to the extent consistent herewith.

1. The complaint alleges that Respondent Carvel Company, herein called Carvel, and Respondent C and D Plumbing and Heating Company, herein called C and D, constitute a single employer under the Act; that Carvel violated Section 8(a)(5) of the Act by its refusal to sign the 1975 collective-bargaining agreement negotiated

between the Union and a multiemployer association, and by substituting C and D as the plumbing contractor on the Addison, Maine, construction site for the purpose of avoiding its bargaining obligation with the Union; and that Carvel violated Section 8(a)(3) of the Act by discriminatorily discharging its employees working on the Addison project.

For the purposes of his Decision, the Administrative Law Judge assumed that Carvel and C and D constitute a single employer, but nevertheless concluded that no violation of the Act had been established. Therefore, he recommended dismissal of the complaint in its entirety without making a specific finding on the single employer issue. As set forth infra, we find, contrary to the Administrative Law Judge, that Carvel's refusal to sign the collective-bargaining agreement was violative of Section 8(a)(5) because its withdrawal from multiemployer bargaining was not timely. Thus, our disposition of the case requires us to pass on the single employer question in order to determine whether both Carvel and C and D are obligated to sign the agreement. For the reasons set forth below, we find that Carvel and C and D are separate employers under the Act.

Richard Carvel, president of Carvel Company, owns 90 percent of the outstanding Carvel stock, while his sister owns the remaining 10 percent. Richard Carvel also owns all of the stock of C and D. Thus, the record establishes common ownership, but that factor is not

determinative in the absence of common control of labor relations policies. 1/ Furthermore, "such common control must be actual or active, as distinguished from potential control." 2/ Other factors to be considered are interrelation of operations and common management.

The record reveals that C and D is a separate legal entity with separate bank and payroll accounts, and separate lines of credit. Management of C and D is vested in Byron Dow who is president, treasurer, and general manager. Regarding labor relations policies, the record shows that C and D employees are hired by Dow or a foreman under his control, while Carvel employees are hired by Carvel foremen. Dow controls the day-to-day labor relations of C and D. In addition, there are no joint employees of Carvel and C and D, and there is no temporary interchange of employees. Thus there are different job estimators and job superintendents for each company.

Although both companies do business as plumbing contractors, they submit separate job bids and do not compete for the same jobs. Carvel's contracts involve a higher dollar volume than those of C and D. Carvel has an employee complement of 30 to 50; C and D has only 9.

On the basis of the foregoing and the record as a whole, we find that Richard Carvel, by virtue of his

1/ Gerace Construction, Inc. and Helger Construction Company, Inc., 193 NLRB 645 (1971).
2/ Id.

status as sole stockholder, has potential control over C and D's operations, but that actual control over labor relations policies and day-to-day operations lies with C and D's president, Byron Dow. Accordingly, we conclude that Carvel and C and D constitute separate employers under the Act.

2. The Administrative Law Judge found that Carvel's withdrawal from the multiemployer bargaining unit was timely and effective under the Board's Retain Associates rule, [3/] and therefore Carvel did not violate Section 8(a)(5) of the Act by refusing to sign the contract ultimately negotiated. We disagree.

In sum, the facts are as follows. For many years, Carvel has been a member of the Pipefitting Contractors Association, Inc., of Maine, herein called the Association, and, as such, a member of the multiemployer bargaining unit and party to a series of contracts with the Union. The 1973 contract between the Association and the Union provided that it was to continue in effect until April 30, 1975, [4/] but that "(i)f either party desires a change in this agreement after April 30, 1975 they shall notify the other party on or before Feb. 1, 1975 and both parties shall meet within fifteen days to discuss same." Absent such notice, the contract automatically renewed itself for another year.

Prior to the February 1 automatic renewal date,

3/ Retail Associates, Inc., 120 NLRB 388, 395 (1958).
4/ All dates herein are in 1975 unless otherwise indicated.

Union President James McLaughlin orally advised the Association that the Union wished to reopen contract negotiations. On February 11, the Union sent the Association a letter whose terms are fully set forth in the Administrative Law Judge's Decision. In brief, this letter stated that the membership had voted to reopen negotiations and included a list of the Union's tentative proposals. In reference to the earlier oral communication with the Association, the Union stated that it was "agreed that in lieu of a called meeting at this time, it would suffice primarily to set forth in a letter, the desired changes in the contract."

The Association replied on February 14, acknowledging receipt of the Union's tentative proposals and stating that "this exchange of letters serves as the initial (sic) negotiation which the contract requires to take place prior to February 15th." In closing, the letter stated that the Union would be contacted "in order to set a firm date for the next meeting for bargaining purposes."

On February 27, the resignation of Carvel Company was submitted to the Association, and on March 5 the resignation was accepted. Shortly thereafter, the Union was informed of Carvel's withdrawal from the Association. The first actual meeting between the Association and the Union for the purpose of negotiating a new agreement occurred on April 9.

After the contract expired, and with no new contract having been agreed upon, the Union commenced

a strike beginning about May 5. The strike lasted until May 31 when the membership ratified a new agreement, effective from May 1, 1975, to April 30, 1977. Carvel has refused to sign the new contract negotiated by the Association and the Union. While there is some testimony in therecord that Carvel stated that it would "pay the wages, fringes and so forth," there is no evidence that it has done so or has implemented the other terms and conditions of the agreement.

In Retail Associates, supra, the Board set forth the rules governing the withdrawal of an employer or a union from multiemployer bargaining. An employer may withdraw without the union's consent prior to the start of bargaining by giving unequivocal notice of the intent to abandon the multiemployer unit and to pursue negotiations on an individual employer basis. However, once negotiations have actually begun, withdrawal can only be effectuated on the basis of "mutual consent" or "unusual circumstances."

We disagree with the Administrative Law Judge's finding that "negotiations" within the meaning of the Board's rule did not begin until the parties' first meeting on April 9, and that therefore Carvel's withdrawal was timely and effective. Here, prior to the February 1 renewal date, the Union orally informed the Association of its intent to reopen the contract, and subsequently submitted a list of its bargaining proposals. On February 14, the Association informed the Union that it had received those proposals and acknowledged that the

process of reopening the contract had begun. Under these circumstances, to hold, as did the Administrative Law Judge, that Carvel's subsequent withdrawal was timely, even though it occurred after the disclosure to the Association of the Union's bargaining demands, would be contrary to the purpose of the Retail Associates rule of "fostering and maintaining stability in bargaining relationships." 5/ For, an employer would thus be permitted to withdraw "in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed" by the Union's proposals. 6/ The rule, however, is designed precisely to prevent such a "disruption of the multiemployer group via a race for bargaining leverage." 7/

In view of the foregoing, we conclude that "negotiations" within the meaning of the Retail Associates rule commenced at the latest on February 14, Carvel's subsequent withdrawal from multiemployer bargaining was untimely, and therefore Carvel violated Section 8(a)(5) and (1) of the Act by its refusal to adopt the agreement reached between the Association and the

5/ 120 NLRB at 393.
6/ Mor Paskesz, 171 NLRB 116, 118 (1968), enfd. 405 F.2d 1201 (C.A. 2, 1969).
7/ Id.

Union. [8/] As we have found that Carvel and C and D are separate employers under the Act, the obligation to sign the contract negotiated between the Union and the Association lies only with Carvel, and we shall order that it take such action.

3. For the reasons set forth in his Decision, we agree with the Administrative Law Judge's dismissal of the complaint allegation that Respondent Carvel violated Section 8(a)(3) of the Act by discriminatorily discharging its employees working on the Addison, Maine, construction site. In addition, as we have found that Carvel and C and D are separate employers, we shall dismiss the complaint insofar as it alleges that Carvel unlawfully substituted C and D as the plumbing

8/ We find no merit in Respondent's contention that the Union consented to Carvel's withdrawal. The Union's failure to immediately object to the withdrawal, standing alone, is insufficient to establish acquiescence. See N.L.R.B. v. John J. Corbett Press, Inc., 401 F.2d 673, 675 (C.A. 2, 1968), enfg. 163 NLRB 154 (1967). Although in a letter dated June 9 the Union inquired as to whether Carvel wished to sign the contract as a "non member," the letter specifically reserved the "right of either party to exercise their rights in the event of failure to reach an agreement." Furthermore, the Union never abandoned its insistence that Carvel accept the Association contract and at no time did the Union indicate to Carvel a willingness to negotiate terms different from those agreed upon with the Association. See I. C. Refrigeration Service, Inc., 200 NLRB 687, 690 (1972). For those reasons, Respondent's reliance on Atlas Sheet Metal Workers, Inc., 148 NLRB 27 (1964), is clearly misplaced.

contractor on the Addison project in order to avoid Carvel's bargaining obligation with the Union.

Conclusions of Law

1. Carvel and C and D are separate employers within the meaning of Section 2(2) of the Act.

2. Respondent Carvel is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and has been at all material times, the exclusive bargaining representative of the employees of Respondent Carvel in the following appropriate unit:

> All journeymen and apprentices of the plumbing and pipefitting industry employed by members of the Association; excluding all other employees, guards, and supervisors as defined in the Act.

5. By its refusal to adopt the agreement reached between the Association and the Union, and by its refusal to give effect to the terms and conditions contained therein, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent Carvel has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action that we find necessary to effectuate the policies

of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Carvel Company, Portland, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Plumbers, Steamfitters and Metal Trades, Local 321, AFL-CIO, as the exclusive bargaining representative of its employees in the appropriate unit described herein.

(b) Refusing to sign and to implement the 1975-77 contract between the Union and the Pipefitting Contractors Association, Inc., of Maine with respect to its employees in the appropriate unit described herein.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the National Labor Relations Act, as amended.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Forthwith sign and implement the 1975-77 contract between the Union and the Association insofar as it applies to employees of Respondent in the described unit, and give retroactive effect thereto from its effective date in 1975.

(b) Make whole its employees in the aforesaid bargaining unit for any loss of pay or other employment

benefits they may have suffered by reason of Respondent's refusal to sign and to implement the aforesaid collective-bargaining agreement between the Union and the Association. Backpay is to be computed in a manner consistent with Board policy as set forth in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest thereon at the rate of 6 percent per annum as set forth in Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Portland, Maine, copies of the attached notice marked "Appendix." 9/ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

9/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

Dated, Washington, D. C. September 23, 1976.

Betty Southard Murphy, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain with Plumbers, Steamfitters and Metal Trades, Local 321, AFL-CIO, by refusing to sign and to implement the 1975-77 contract between the Union and the Pipefitting Contractors Association, Inc., of Maine.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act, as amended.

WE WILL forthwith sign and implement the 1975-77 contract between the Union and the Association and give retroactive effect thereto, from its effective date in 1975.

WE WILL make whole our employees in the bargaining unit for any loss of pay or other employment benefits they may have suffered by reason of our refusal to sign and to implement the aforesaid collective-bargaining agreement between the Union and the Association.

THE CARVEL COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3348.

United States Court of Appeals for the First Circuit

No. 76-1490

THE CARVEL COMPANY,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*, and
DOOLING, *District Judge**

Leonard Kopelman for petitioner.
Joseph Norelli, Attorney, with whom *John S. Irving*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Robert Sewell*, Attorney, were on brief, for respondent.

September 1, 1977

DOOLING, *District Judge*. The Carvel Company petitions to set aside an order of the National Labor Relations Board which required Carvel forthwith to sign and implement the 1975-1977 contract negotiated between Local No. 321 of the Plumbers, Steamfitters and Metal Trades, AFL-CIO, and the Pipefitting Contractors Association, Inc., of Maine, and the Board cross-petitions for enforcement of the order.

* Of the Eastern District of New York, sitting by designation.

The Board based its order on its finding that Carvel's withdrawal from the multiemployer bargaining that emanated in the contract took place only after negotiations had commenced, that the withdrawal was therefore untimely, and that, in consequence, Carvel's refusal to adopt the contract reached between the Pipefitting Contractors Association and Local No. 321 was an unfair labor practice under Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. 158 (a)(5) and (1). Carvel contends that negotiations did not in fact commence until over a month after it submitted its resignation from the Pipefitting Contractors Association, that the Board misinterpreted and misapplied the rule limiting the employer's power to withdraw from multiemployer bargaining, and that, even if its withdrawal was untimely, a later impasse in the multiemployer bargaining, and the Local's condonation of the withdrawal, relieved Carvel of the consequences of its untimely withdrawal. The appeal would test the boundaries of the Board's "*Retail Associates* doctrine" (1958 120 NLRB 388).

Petitioner Carvel had for many years been a member of the Pipefitting Contractors Association, and that Association had for about twenty years negotiated contracts for its membership with Local 321. The two year contract between the Association (representing Carvel among other member firms) and Local 321 covering the 1973-1975 period provided —

> "THIS AGREEMENT . . . is to continue through the period from May 1, 1973 to April 30, 1975. If either party desires a change in this agreement after April 30, 1975 they shall notify the other party on or before Feb. 1, 1975 and both parties shall meet within fifteen days to discuss same.

> "If no such notice is given, the Agreement shall remain in effect until April 30, 1976 and shall remain in effect on a year to year basis thereafter until such notification is made."

The contract provided that Local 321 was recognized as the sole and exclusive agency and representative of the employees covered by the contract for collective bargaining purposes, and that the Association was recognized as the sole and exclusive bargaining agent for all "Employers of the members of Local No. 321."

The business manager of Local 321 telephoned the president of the Association before February 1, 1975, and inquired (for he had not handled earlier negotiations) about the normal procedure for initiating negotiations. Informed that it was done by letter, Local 321 on February 11, 1975, sent a letter to the Association advising that the Local had voted to reopen contract negotiations, and tentatively proposing a wage increase of $1.65 an hour and other changes in contract terms. The letter continued:

> "In a conversation with Earle Reed [the president of the Association], we agreed that in lieu of a called meeting at this time, it would suffice primarily to set forth in a letter, the desired changes in the contract . . . .
>
> "We are ready at any time to sit down with you and discuss the issues as presented."

It appears that before February 1st the Local's business manager had filed "the appropriate papers with the Federal mediation and State mediation Boards." The Association answered the Local's letter on February 14, 1975, saying,

> "This acknowledges receipt of your letter dated February 11, 1975, which listed your tentative proposals for changes in the present contract . . . .

> "This also confirms our understanding that this exchange of letters serves as the initial negotiation which the contract requires to take place prior to February 15th.
>
> "Your tentative proposals will be presented to our Committee, and we will contact you in order to set a firm date for the next meeting for bargaining purposes."

On February 27, 1975, Carvel wrote the president of the Association stating that

> "With much regret, I am submitting my resignation from the Pipe Fitting Contractors Association . . . .
>
> ". . . This decision is not the result of any pressure from either fellow contractors or any of the Locals, but rather a decision of my own choosing."

On March 5th the Association acknowledged receipt of Carvel's letter

> ". . . containing your resignation from this Association, which is hereby accepted with regret.
>
> "Following a regularly scheduled meeting to be held on March 7th, the Association will furnish the three Maine U.A.Locals with a current listing of Association members, as required by our labor contracts with the Locals. As a result of your resignation your name will not appear on this listing, and you will not be represented by the Association in future bargaining with these three Locals."

The Association sent the current membership roster of the Association, dated March 5, 1975, to Local 321 on March 10, 1975; Carvel was not listed as a member. Shortly after receiving the list the Local's business manager asked Carvel's president why Carvel's name was not listed, and

he was told that Carvel was no longer affiliated with the Association but that Carvel would pay the wages, fringes and so forth, but would not sign a contract with the Union.

The first face-to-face meeting between the Association and Local 321 took place on April 9, 1975. (Asked whether "the first negotiating meeting between the parties was held on April 9, 1975" the Local's business manager incautiously answered, "Yes.") The evidence was that the Local deferred the meeting until the pressure of "a lot more plumbing work" could be brought to bear on the employers. At the first meeting the Union insisted on a one year contract and the Association on a two year contract. When this had been brought out, the examination of the business agent, by Carvel's counsel, continued,

> "Q There was an impasse, wasn't there?
>
> A Yes."

Three sessions were held in April without reaching any agreement, and on May 6th the membership of Local 321 turned down the Association's offer and voted to strike. The strike continued until May 31st, when the membership of Local 321 ratified a new contract for the two year period May 1, 1975, to April 30, 1977. That contract followed two further negotiation sessions during May. During the strike period the Local's business manager asked Carvel to sign such a letter-of-intent as non-members of the Association sign to give assurance that they will conform to the multi-employer contract retroactively to its effective date. Carvel declined to sign such a letter. Efforts were made after the strike to reach some agreement with Carvel but the evidence, far from clear, does not indicate that Carvel sought or took advantage of any tendered opportunity to arrive at an individual contract with Local 321.

The unfair labor practice charge was filed on June 23, 1975, amended August 7, 1975, went to hearing in December

1975, and on April 21, 1976, the Administrative Law Judge recommended dismissal of the complaint on the ground that, despite the dictum in *Retail Associates* that withdrawal of an employer or a union from a duly established multiemployer bargaining unit was not permissible (138 NLRB at 395)

> ". . . except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations",

no later Board decision had held untimely a withdrawal before the start of actual bargaining negotiations. The Board rejected the Administrative Law Judge's recommendation. The Board did not rely on the dictum in *Retail Associates*. Rather it stated the rule in this language:

> "An employer may withdraw without the union's consent prior to the start of bargaining by giving unequivocal notice of the intent to abandon the multiemployer unit and to pursue negotiations on an individual employer basis. However, once negotiations have actually begun, withdrawal can only be effectuated on the basis of 'mutual consent' or 'unusual circumstances.' "

It found on the evidence that "negotiations" within the meaning of the *Retail Associates* rule commenced at latest on February 14th. In rejecting the Administrative Law Judge's reading of the facts, the Board, after summarizing the facts through the date of the Association's February 14th acknowledgement "that the process of reopening the contract had begun," said,

> "Under these circumstances, to hold . . . that Carvel's subsequent withdrawal was timely, even though it occurred after the disclosure to the Association of the

> Union's bargaining demands, would be contrary to the *Retail Associates* rule of 'fostering and maintaining stability in bargaining relationships.'[5] For, an employer would thus be permitted to withdraw 'in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed' by the Union's proposals.[6] The rule, however, is designed precisely to prevent such a 'disruption of the multiemployer group *via* a race for bargaining leverage.'" [The citations are to *Retail Associates* 120 NLRB at 393 and to *Mor Paskesz*, 1968, 171 NLRB 116, 118, enf'd., 2d Cir. 1969, 405 F.2d 1201.]

Retail Associates arose out of a union's use after months of negotiation of the tactic of picketing one of three employers in a multiemployer unit as a means of inducing all three employers to agree to a contract and the union's later attempt to withdraw from multiemployer bargaining without the employers' consent. The Board's decision did not enunciate a new principle but it did elaborate its expression. It invoked the decision in *NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo Linen*") 1957, 353 U.S. 87, as establishing the employer's right, under certain circumstances to preserve the integrity of association bargaining. *Buffalo Linen* was a case in which the members of an association locked out their employees when the union struck and picketed the plant of one employer in furtherance of effort to bring the multiemployer bargaining to a conclusion. The Court reversed a holding that the lockout was an unfair labor practice, reinstating the Board's holding that the lockout was defensive and privileged rather than retaliatory and unlawful. The Court emphasized by reference to the legislative history that the Congress intended the Board to continue its established administrative practice of certifying multiemployer units and to leave to

the Board's specialized judgment the inevitable questions concerning multiemployer bargaining that were bound to arise. Noting the tension between employees' right to strike and employers' interest in measures of self-help, the Court said (353 U.S. at 96-97):

> "Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multiemployer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.
>
> "The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship."

While general enforceability was not directly in issue, the Supreme Court in *NLRB v. Strong*, 1969, 393 U.S. 357, 359, when passing on the power of the Board to order an employer to pay fringe benefits agreed to in the multiemployer contract as well as back pay, observed that it was not disputed that the employer "withdrew from the . . . Association too late to escape the binding force of the agreement it had negotiated for him, supplanting previous agreements which had been negotiated in the same way", nor was it disputed that the employer's failure to sign the

agreement was an unfair labor practice. Board orders relieving against plainly belated attempts to withdraw from multiemployer units during or at the close of negotiations are numerous. See, *e.g.*, *NLRB v. Sheridan Creations, Inc.*, 2d Cir. 1966, 357 F.2d 245; *Universal Insulation Corp. v. NLRB*, 6th Cir. 1966, 361 F.2d 406; *NLRB v. Tulsa Metal Works, Inc.*, 10th Cir. 1966, 367 F.2d 55; *NLRB v. Spun-Jee Corp.*, 2d Cir. 1967, 385 F.2d 379, 382; *NLRB v. John J. Corbett Press, Inc.*, 2d Cir. 1968, 401 F.2d 673; *NLRB v. Parkesz*, 2d Cir. 1969, 405 F.2d 1201; *NLRB v. Johnson Sheet Metal, Inc.*, 10th Cir. 1971, 442 F.2d 1056. *Retail Associates* treats the principle as one applying both to the union and to each employer in the multiemployer unit. Each employer and the union are alike free to withdraw from multiemployer bargaining by giving timely and unequivocal notice of intention to do so. See, *e.g.*, *Detroit Newspaper Publishers Assn v. NLRB*, 6th Cir. 1967, 372 F.2d 569; *Publishers Assn of New York City v. NLRB*, 2d Cir. 1966, 364 F.2d 293. But, in the absence of unusual circumstances, the beginning of the negotiation ends the right to withdraw.

The application of the *Retail Associates* rule over the last two decades has given it sufficient precision of formulation to leave action under it unembarrassed by uncertainty and misgivings about possibly vagarious administrative applications. No more is necessary to operate safely in its domain of operation than advertence to the notice dates in the current bargaining agreement. Freedom of action is uncontrolled so long as it is unequivocal and timely. The *Retail Associates* rule is, none the less, an administrative construct intended to serve policy aims, stability in industrial relations and fairness in negotiation. As the cases insist, multiemployer bargaining rests on the reality of the consent of the union and of each employer, but the *Retail*

Associates rule as formulated and applied makes clear that it is the real consent given at the outset that is meant, and once given at the outset of the negotiations, it cannot be withdrawn except in unusual circumstances. That is not familiar contract law but is a legitimate administrative rule in implementation of Section 8(a)(1), (5) and (b)(3) in the context of multiemployer bargaining.

It is true, as Carvel argues, that no reported decision appears to have placed the beginning point of negotiation at so early a point. But it is not possible to say that the evidence does not support the decision that the parties had opened their negotiations. The contract was reopened for negotiation as required by the terms of the 1973-1975 contract. Local 321 stated its position with completeness, and, while it prudently characterized its proposals as "tentative proposals presented for negotiation," the Association undertook to present them to its Committee. No more could, expectably, be accomplished by a first meeting, and the parties agreed that their letters would serve as the initial negotiation required by the contract. Carvel, acting through the Association, was a party to the letter exchange and to that agreement on its significance. If Carvel would have had it otherwise, it had only to notify the Association and Local 321 before the contract date, for when those dates came and Local 321 and the Association acted, contract negotiations were under way. So, certainly, the Board was free to find, for with it lay the task of defining, within reason, what should mark the beginning of negotiations for purposes of applying the *Retail Associates* rule.

The challenging critique of *NLRB v. Sheridan Creations, Inc.*, *supra*, in *NLRB v. Field & Sons, Inc.*, 1st Cir. 1972, 462 F.2d 748, 749-750, was not necessary to the decision. Field attempted to withdraw from the multiemployer unit after his only unionized employees quit his employ and left the

area; the Board argued for compelling Field to sign the multiemployer agreement regardless of the reason for the refusal to sign and regardless of good faith and lack of adverse effect upon the bargaining process. The court suggested that an employer should be free to withdraw so long as no commitments have been made "at least absent some showing of detriment or bad faith." The court noted as a singular comparison that the Board had ruled that a union member, though contract bound to his union, may withdraw from the union with impunity during a strike even though he voted for the strike. But the Supreme Court, while holding that supervening strike hardships authorize the member to resign if there are no express limitations on members' rights to resign, has left open the question of the extent to which the contractual relationship of union to member may curtail the freedom to resign. *NLRB v. Granite State Joint Board*, 1972, 409 U.S. 213, 217-218. Congress has, moreover, entrusted to the Board's expertise, at least "subject to limited judicial review", formulation of rules in this area. *See Buffalo Linen, supra*, at 96. This rule is an "essential ingredient of [the Board's] efforts to achieve peaceful labor relations." *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475, 480 (3d Cir. 1975). Certainly as applied to Carvel in this case, the Board's rule is not an abuse of its discretion. Carvel has not brought forward any justification for its action.

Carvel argues that bargaining had reached an impasse that justified its withdrawal. *Fairmount Foods Co. v. NLRB*, 8th Cir. 1972, 471 F.2d 1170, 1172-1173; *NLRB v. Beck Engraving Co., Inc., supra*. Carvel's attempted withdrawal, however, was not occasioned by any condition of impasse, and, moreover, there is no evidence to support the assertion. The business manager's assent to the idea that there was an "impasse" referred only to the fact that

at the first of three April bargaining sessions the parties had not agreed on the duration of the new contract.

The Board found the facts against Carvel's contention that Local 321 consented to Carvel's withdrawal and negotiated with it on an individual basis. The evidence amply supports the Board's findings in these respects. The evidence supports only the conclusion that Local 321 preserved contact with Carvel and probed for Carvel's ultimate purpose and intention.

It is argued that the Association and Local 321 did not follow the strict language of the 1973-1975 contract in reopening the contract and substituting the letter exchange for a face to face meeting. The contention is not available. The Association acted for Carvel, certainly until February 27th or March 5th. The Association's agreement to reopen the contract and to substitute the exchange of letters for a face to face meeting was action taken in Carvel's behalf. The convenient informality with which the Association and Local 321 proceeded through the first stage of negotiation disappointed no fair expectation of Carvel, and it adhered to the substance of the contract clause.

Petition for review denied.

Cross petition for enforcement granted.

Adm. Office, U.S. Courts - Addison C. Getchell, Inc. Legal Printers Boston

No. 77-744

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE CARVEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-744

THE CARVEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-43) is reported at 560 F. 2d 1030. The decision and order of the National Labor Relations Board (Pet. App. 19-31) and the decision of the administrative law judge (Pet. App. 2-18) are reported at 226 NLRB 111.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. The petition for a writ of certiorari was filed on November 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's withdrawal from a multiemployer bargaining association was untimely.

STATEMENT

1. Petitioner was a longstanding member of the Pipefitting Contractors Association (the Association), which, for approximately 20 years, had negotiated agreements for its members with Local No. 321 of the Plumbers, Steamfitters and Metal Trades, AFL-CIO (the Union). The collective bargaining agreement between the Association and the Union covering 1973-1975 provided that "[i]f either party desires a change in this agreement after April 30, 1975 they [*sic*] shall notify the other party on or before Feb. 1, 1975 and both parties shall meet within 15 days to discuss same" (Pet. App. 33).[1] Prior to February 1, 1975, the Union's business manager telephoned the Association's president and informed him that the Union desired to open negotiations to change the agreement (Pet. App. 22-23, 34).[2] On February 11 the Union sent the Association a letter, in which the Union proposed several new provisions as the subjects of discussion, remarking that in the earlier conversation "we agreed that in lieu of a called meeting at this time, it would suffice primarily to set forth in a letter the desired changes" and adding that the Union was "ready at any time to sit down with you and discuss the issues as presented" (Pet. App. 34, 23).

The Association responded with a letter on February 14, in which it stated its "understanding that this exchange of letters serves as the initial negotiation which

---

[1]The agreement was to remain in effect until April 30, 1975, and be extended automatically year-to-year in the absence of timely notice of desire for change (Pet. App. 33-34).

[2]The Union also filed, prior to February 1, "appropriate papers with the Federal mediation and State mediation Boards" (Pet. App. 34).

the contract requires to take place prior to February 15th." It informed the Union that the February 11 "proposals will be presented to our Committee, and we will contact you in order to set a firm date for the next meeting for bargaining purposes" (Pet. App. 34-35, 23).

On February 27 petitioner resigned from the Association (Pet. App. 35, 23). The Union did not learn of the withdrawal until March 10, when it received a list of the Association's current members; the Union promptly questioned petitioner's absence from the list (Pet. App. 35-36). The Union never consented to petitioner's withdrawal (Pet. App. 26 n. 8, 43).

Five face-to-face negotiating sessions between the Union and the Association took place in April and May. Following a three-week strike in May, a new collective bargaining agreement was reached. Petitioner refused to sign the agreement or to abide by its terms (Pet. App. 36, 23-24).

2. The Board found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140-141, 29 U.S.C. 158(a)(5) and (1), by refusing to accept the agreement negotiated by the Union and the Association. The Board held that petitioner's withdrawal from the Association was untimely under the rule of *Retail Associates, Inc.*, 120 NLRB 388, 395. Under the *Retail Associates* doctrine "[a]n employer may withdraw [from multiemployer bargaining] without the union's consent prior to the start of bargaining * * * [but] once negotiations have actually begun, withdrawal can only be effectuated on the basis of 'mutual consent' or 'unusual circumstances' " (Pet. App. 24). Disagreeing with its administrative law judge (who found that bargaining did not begin until the first face-to-face meeting on April 9), the Board concluded that negotiations began with the

exchange of letters between the Union and the Association in the first half of February, approximately two weeks before petitioner's withdrawal (Pet. App. 24-25). The Board explained (Pet. App. 25; footnotes omitted):

> to hold, as did the Administrative Law Judge, that [petitioner's] subsequent withdrawal was timely, even though it occurred after the disclosure to the Association of the Union's bargaining demands, would be contrary to the purpose of the *Retail Associates* rule of "fostering and maintaining stability in bargaining relationships." For, an employer would thus be permitted to withdraw "in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed" by the Union's proposals. The rule, however, is designed precisely to prevent such a "disruption of the multiemployer group *via* a race for bargaining leverage."

Consequently, the Board held that the attempted withdrawal was ineffective, and that petitioner must recognize the two-year agreement negotiated between the Association and the Union in the spring of 1975.

3. The court of appeals enforced that Board's order, holding that "[c]ertainly as applied to [petitioner] in this case, the Board's rule is not an abuse of discretion" (Pet. App. 42). The court found that the evidence supported "the [Board's] decision that the parties had opened their negotiations" (Pet. App. 41) prior to petitioner's resignation from the Association. It continued (*ibid.*):

> The contract was reopened for negotiation as required by the terms of the 1973-1975 contract. [The Union] stated its position with completeness, and, while it prudently characterized its proposals as

> "tentative proposals presented for negotiation," the Association undertook to present them to its Committee. No more could, expectably, be accomplished by a first meeting, and the parties agreed that their letters would serve as the initial negotiation required by the contract. [Petitioner], acting through the Association, was a party to the letter exchange and to that agreement on its significance. If [petitioner] would have had it otherwise, it had only to notify the Association and [the Union] before the contract date, for when those dates came and [the Union] and the Association acted, contract negotiations were under way. So, certainly, the Board was free to find, for with it lay the task of defining, within reason, what should mark the beginning of negotiations for purposes of applying the *Retail Associates* rule.

ARGUMENT

Parties to multiemployer bargaining ordinarily may not withdraw from the bargaining association once negotiations for a collective bargaining agreement have begun. This rule, established by the Board in *Retail Associates, Inc.*, 120 NLRB 388, has been uniformly upheld by the courts of appeals.[3] Petitioner does not

---

[3]See, *e.g.*, *National Labor Relations Board* v. *Sheridan Creations, Inc.*, 357 F. 2d 245, 247-248 (C.A. 2); *National Labor Relations Board* v. *Dover Tavern Owners' Association*, 412 F. 2d 725, 728-729 (C.A. 3); *Universal Insulation Corp.* v. *National Labor Relations Board*, 361 F. 2d 406, 408 (C.A. 6); *National Labor Relations Board* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9); *National Labor Relations Board* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1059 (C.A. 10).

appear to challenge the rule.[4] It contends instead that the Board erred in concluding that actual negotiations had commenced before it withdrew from the Association and that, in any event, the application of the *Retail Associates* rule here was an abuse of discretion. Petitioner's arguments thus involve only the application of settled rules to the facts of this case and do not raise any issue justifying review by this Court.

The Board properly concluded that the exchange of letters between the Union and the Association on February 11 and 14—which occurred prior to petitioner's withdrawal—was the start of negotiations. The letters show the unambiguous intention of the Union and the Association to open bargaining.

Moreover, it was not improper or arbitrary for the Board to apply the *Retail Associates* rule here. The rationale of *Retail Associates* is that a party should not be allowed to assess the opposite side's proposals before deciding whether to withdraw. Here the Union's proposals were disclosed before petitioner announced its decision to withdraw.[5] Petitioner was on notice of the time when

---

[4]Petitioner's suggestion (Pet. 8) that the Board's application of its *Retail Associates* policy "without a public hearing" was an abuse of discretion is insubstantial. Petitioner apparently contends that the Board should have adopted the *Retail Associates* doctrine by rulemaking rather than adjudication (petitioner had a full adjudicatory hearing), but "[a]djudicated cases may and do * * * serve as vehicles for the formulation of agency policies, which are applied and announced therein," and such cases "generally provide a guide to action that the agency may be expected to take in future cases." *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766; see also *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294.

[5]Petitioner's assertion (Pet. 7) that the Board's decisions on the timeliness of withdrawal are inconsistent is based solely on the assumption of the hearing examiner in *Cooks, Waiters and Waitresses Union, Local 327*, 131 NLRB 198, 209 n. 26, that *Retail Associates* was of doubtful validity. But since *Local 327* was decided, the guidelines announced in *Retail Associates* have been consistently applied by the Board and have been uniformly approved by the courts. See note 3, *supra*, and *Mor Paskesz*, 171 NLRB 116, 118, enforced, 405 F. 2d 1201 (C.A. 2); *John J. Corbett Press, Inc.*, 163 NLRB 154, 157, enforced, 401 F. 2d 673 (C.A. 2); *Evening News Association*, 154 NLRB 1482, 1483, and 154 NLRB 1494, enforced, 372 F. 2d 569 (C.A. 6).

negotiations would be reopened, and it could have withdrawn before February 1, 1975, if it had desired to do so. It did not, and therefore it was required to comply with the agreement negotiated between the Union and the Association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL T. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

JANUARY 1978.

DOJ-1978-01